

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

$$\left. \begin{array}{l} \text{ } \end{array} \right\}$$

ORDER

ISSUES

- (1) Whether claimant's injuries arose out of and in the course of his employment with the self-insured respondent.
- (2) Whether claimant should have been awarded medical treatment with the costs assessed to the respondent.
- (3) Whether claimant should have been awarded a vocational assessment and temporary total disability compensation appropriate thereto.
- (4) Whether written claim was timely made for accidents prior to May 17, 1993.
- (5) The applicability of the 1993 Amendments to K.S.A. 44-520 to this claim which arose prior to the effective date thereof.
- (6) The admissibility of affidavits and discovery deposition excerpts.

The finding by the Administrative Law Judge that claimant has not carried his burden of proving that he met with personal injury by accident arising out of and in the

course of his employment with respondent should be affirmed. The weight of the credible evidence persuades this trier of fact that the claimant's injury did not occur in the manner to which claimant testified. The disputed issue of whether claimant suffered personal injury by accident arising out of and in the course of his employment and whether his present claim for benefits relates to such, turns primarily on the credibility and believability of the claimant. The Administrative Law Judge had an opportunity to observe the testimony of the claimant. He accordingly had the opportunity to judge the claimant's demeanor and assess his credibility while he was testifying at the preliminary hearing. The Appeals Board takes into consideration the Administrative Law Judge's opportunity to observe the claimant and generally gives some deference to the findings and conclusions of the Administrative Law Judge where the testimony is conflicting.

In this case claimant calls into question the admissability of certain affidavits and discovery deposition excerpts which were allegedly placed into evidence by respondent and allegedly were improperly considered by the Administrative Law Judge. The record is silent as to whether or not the Administrative Law Judge considered the evidence which claimant finds objectionable and there is no ruling by the Administrative Law Judge contained within the record as to the admissibility of that evidence. Ordinarily, the Appeals Board would consider remanding the matter to the Administrative Law Judge for clarification as to the record considered by the Administrative Law Judge in reaching his decision. In this instance, that course is unavailable due to the retirement of Judge Ward.

A review of the record reveals that following the claimant's testimony at the preliminary hearing held January 17, 1995, respondent requested that the preliminary hearing record be left open for purposes of deposing certain people which claimant alleged he told about his injury. Claimant's counsel had no objection to that request and Judge Ward granted same. There was no specific mention as to how long the record was to be left open but certainly it can be assumed that both claimant and the Administrative Law Judge assumed that those witnesses would be deposed by the respondent within a reasonable amount of time.

The record contains a letter dated June 9, 1995 to Judge Ward by counsel for claimant requesting that he rule on the preliminary hearing issues. No depositions had been taken by respondent. That letter was followed by a brief of respondent, which was stamped received by the Topeka judicial offices of the Kansas Division of Workers Compensation on June 12, 1995, with certain affidavits and portions of claimant's discovery deposition attached thereto which were offered in support of respondent's position for purposes of the preliminary hearing. It is to those affidavits and pages from the transcript of the claimant's discovery deposition to which the claimant objects and seeks a ruling concerning their admissability.

The Appeals Board declines to make a finding concerning the admissability of evidence when it is not clear whether such evidence was considered by the Administrative Law Judge, and where there has been no ruling by the Administrative Law Judge in the first instance concerning its admissability. For purposes of this appeal from a preliminary hearing order, it is not necessary for the Appeals Board to consider such evidence to reach a determination of the jurisdictional issues raised. In most instances where a claimant is the only witness to testify at a preliminary hearing, his testimony would be uncontroverted and, unless it is so improbable or unreasonable as to be untrustworthy, it would be accepted as conclusive. However, in this instance, not only is claimant's testimony as to a work-related injury contradicted by the medical records and reports, but claimant's own testimony is self-contradictory. Claimant's preliminary hearing testimony is thus not uncontroverted because the evidence contained in the medical records disputes the claimant's allegations of a work-related injury. In addition, the contradictions in claimant's testimony renders it untrustworthy and unpersuasive.

The Appeals Board finds, without considering the evidence submitted by respondent subsequent to the January 17, 1995 hearing that the claimant has failed to meet his burden of proof on the issue of accident arising out of and in the course of employment. The

remaining issues raised by claimant are thereby rendered moot and need not be addressed at this time.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the July 6, 1995 Order of Administrative Law Judge James R. Ward should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 1995.

BOARD MEMBER _____

BOARD MEMBER _____

BOARD MEMBER _____

c: Derek J. Shafer, Topeka, KS
 Daniel M Runion, Topeka, KS
 Darin M. Conklin, Topeka, KS
 James R. Ward, Administrative Law Judge
 Philip S. Harness, Director